

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

1958

No. 589

10

ALLIED STORES OF OHIO, INC., APPELLANT,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER
OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED OCTOBER 30, 1957

PROBABLE JURISDICTION NOTED JANUARY 6, 1958

Supreme Court of the United States

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IN SUPREME COURT OF OHIO

No. 34926

ALLIED STORES OF OHIO, INC., Appellant,

v.

STANLEY J. BOWERS, TAX COMMISSIONER, Appellee.

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY

EXCERPTS FROM MEMORANDA OF PLEADINGS, ETC., FILED,
WRITS ISSUED, ETC., JUDGMENTS, ORDERS AND DECREES

Journal No. 42, page 243.

Appeal From the Court of Appeals of Cuyahoga County:

JOURNAL ENTRY OF JUDGMENT—January 30, 1957

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant his costs herein expended taxed at \$.....

Ordered, That a special mandate be sent to the Court of Appeals of Cuyahoga County, to carry this Judgment into Execution.

Journal No. 42, page 259.

Rehearing Docket:

JOURNAL ENTRY OF ORDER DENYING REHEARING—
February 20, 1957

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 4]

[File endorsement omitted]

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF OHIO

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed April 30, 1957

I. Notice is herewith given that Allied Stores of Ohio, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio affirming the Court of Appeals of Ohio for Cuyahoga County, such final judgment having been entered on January 30, 1957, and from the final judgment of the said Supreme Court of Ohio denying the appellant's application for rehearing entered on February 20, 1957.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in the cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

- 1) A copy of the final determination of the Tax Commissioner.
- 2) A copy of appellant's notice of appeal from the Tax Commissioner's final determination, as filed with the Board of Tax Appeals.
- 3) A copy of the opinion of the Board of Tax Appeals of Ohio.
- 4) A copy of the notice of appeal from the Board of Tax Appeals, to the Court of Appeals of Ohio for Cuyahoga County, as filed with that Court on behalf of the appellant.
- 5) A copy of the opinion and journal entry of the Court of Appeals of Ohio for Cuyahoga County.

[fol. 6] 6) A copy of the notice of appeal from the Court of Appeals of Ohio for Cuyahoga County, as filed with this Court on behalf of the appellant.

7) A copy of the opinion of this Court in this case.

8) A copy of the application for rehearing, as filed with this Court on behalf of the appellant.

9) A transcript of docket and journal entries of this Court in this cause, on the merits and on application for rehearing.

10) A transcript of all transcripts and evidence certified by the Board of Tax Appeals to the Court of Appeals of Ohio for Cuyahoga County, and certified in turn by that Court to this Court.

III. The following questions are presented by this appeal:

1. Does former Section 5701.08, Revised Code, deny the appellant equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?
2. Does a statute which excepts from property tax, merchandise belonging to nonresidents when held for storage only, but taxes such merchandise belonging to residents deny residents equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

/s/ Carlton S. Dargusch, Attorney for Allied Stores of Ohio, Inc., Appellant, 33 North High Street, Columbus 15, Ohio.

[fol. 7] Proof of service (omitted in printing).

[fol. 8] Certificate of service (omitted in printing).

[fol. 10]

[File endorsement omitted]

[fol. 11]

IN THE SUPREME COURT OF OHIO.

ALLIED STORES OF OHIO, INC., Appellant,

v.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, Appellee.

CERTIFICATE OF SUPREME COURT OF OHIO AS TO
CONSTITUTIONAL QUESTION—Filed May 20, 1957

On motion of the appellant, Allied Stores of Ohio, Inc., it is ordered to be certified and made a part of the record of the proceedings and of the judgment of the Court in this cause that by its appeal from the Court of Appeals of Cuyahoga County, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said Section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of non-resident corporations, and that the Court found, pursuant to appeal, briefs and oral argument of counsel, that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the Section to include Appellant within the exception; that therefore the Section must stand; that so standing [fol. 12] and so construed the Section was not repugnant to the United States Constitution or if repugnant, had nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the Court's decision.

Witness The Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio

/s/ Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 14]

BEFORE THE DEPARTMENT OF TAXATION

OPINION AND ORDER—March 2, 1955

This proceeding being the application of Allied Stores of Ohio, Inc., an inter-county corporation, Cleveland, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its inter-county return of taxable property for the year 1954, eliminated from the average value of its merchandise inventories reported therein an amount representing the value of merchandise held by it in storage warehouses for storage only. In support of the value so eliminated, the [fol. 15] applicant submitted with its return a separate schedule setting forth the monthly values of such stored property. The applicant also filed a claim for deduction from the book value of its furniture, fixtures, and equipment taxable in Schedule 4.

In passing upon the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment, which claim was allowed in full, the separate schedule submitted by the applicant, with respect to merchandise in storage, was construed as a claim for deduction and the average monthly value reflected in such schedule was deducted from the average value of taxable merchandise inventories as reported by the applicant. This action resulted in a duplicate reduction for such property inasmuch as the applicant itself had eliminated the value of merchandise in storage from the average value of taxable inventories listed in Schedule 3A. Subsequently, the average value of merchandise held in storage for storage only was added back to the taxable value listed in Schedule 3A and an amended preliminary assessment certificate issued reflecting such action. The applicant filed this application for review and redetermination therefrom, contending that the statutes purported to levy a tax on merchandise and agricultural products of residents of this state held in storage warehouses for storage only were unconstitutional and void, in that, identical property of a nonresident is

excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton [fol. 16] County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E., 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d, 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d, 162. Thus, the Tax Commissioner finds no error in the assessment as made insofar as it purports to assess merchandise and agricultural products of the applicant held in storage warehouses for storage only since such property is subject to taxation under the provisions of Sections 5701.08, 5709.01, 5711.22 and correlated sections of the Revised Code. However, the Tax Commissioner finds that because of the duplicate reduction in applicant's taxable inventories hereinbefore explained, that the true average value of merchandise in storage has not as yet been assessed. Taking such fact into account and making proper allowances in applicant's taxable inventories as provided in Rule No. 222 of the Department of Taxation, the Tax Commissioner finds the true average value of applicant's inventories to be \$6,784,927.00 for the year 1954.

The Tax Commissioner, being further advised, finds that the applicant's claim for deduction from the book value of its furniture, fixtures, and equipment was not well taken and that such claim should be, and the same hereby is, denied in its entirety. The Tax Commissioner also finds that applicant's net taxable credits and money and other taxable intangibles as listed were deficient as disclosed upon audit and that corrections therein are in order.

Giving effect to the findings made herein with respect to property of the applicant taxable in Schedules 4, 9, and

10, the Tax Commissioner finds that the true value of property taxable in such schedules for the year 1954 is as follows:

| Schedule | True Value |
|----------|----------------|
| 4 | \$2,645,009.00 |
| 9 | 1,935,390.00 |
| 10 | 592,400.00 |

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance with the findings made in this journal entry. Such certificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

[fol. 17] [File endorsement omitted]

[fol. 23]

BEFORE THE BOARD OF TAX APPEALS OF OHIO

STIPULATION OF FACTS—Filed June 1, 1955

It is stipulated and agreed by and between counsel for the respective parties hereto that the following may be considered and accepted as the facts for all purposes pertinent to the consideration and decision of the above case:

1. Allied Stores of Ohio, Inc., appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio with its principal office at Euclid and 13th street, Cleveland, Ohio.

2. Appellant operates retail department stores and maintains warehouses in the cities of Akron, known as The A. Polksky Company; Cincinnati, known as The Rollman and Sons Co.; Cleveland, known as The Sterling Lindner Davis Company; and Columbus, known as Morehouse-Fashion Co. See Exhibits A, B, C, and D, attached hereto and made a part hereof.

3. The tax year in question is 1954, and the property covered thereby was listed as of January 31, 1954, except inventory, including inventory stored in storage ware-

houses, which was averaged for the twelve months covered by the fiscal year, February 1, 1953, to January 31, 1954, and such inventory including inventory stored in storage warehouses was assessed by appellee as taxable.

4. The warehouses in which inventory was stored by appellant were as follows:

(1) The A. Polsky Company warehouse in Akron is a private warehouse leased, operated and controlled by appellant. Exhibit A supra.

(2) The Rollman and Sons Co. warehouses in Cincinnati are private warehouses leased, operated and controlled by appellant. Exhibit B supra.

[fol. 23a] (3) The Sterling Lindner Davis warehouse in Cleveland is a private warehouse owned, operated and controlled by appellant. Exhibit C supra.

(4) The Morehouse-Fashion Co. warehouse in Columbus is a private warehouse leased, operated and controlled by appellant. Exhibit D supra.

5. The dollar value of the inventory carried in each of the foregoing warehouses is set forth in Exhibit E, attached hereto and made a part hereof, and is shown for the fiscal year beginning February 1, 1953 and ending January 31, 1954. All of said property was owned by the appellant.

6. The dollar value of the inventory carried in The A. Polsky Company warehouse in Akron was divided into two major groups as follows:

County: Summit

Taxing District: Akron

| | | Group 1 | Group 2 |
|----------------------|------------|---------|---------|
| January, 1954 | \$ 387,115 | 349,178 | 37,937 |
| February, 1953 | 378,417 | 341,332 | 37,085 |
| March, 1953 | 389,929 | 351,716 | 38,213 |
| April, 1953 | 417,284 | 376,390 | 40,894 |
| May, 1953 | 494,263 | 445,825 | 48,438 |
| June, 1953 | 367,460 | 331,449 | 36,011 |
| July, 1953 | 243,136 | 219,309 | 23,827 |
| August, 1953 | 239,966 | 216,449 | 23,517 |

| | | Group 1 | Group 2 |
|--|---------------|---------------|-------------|
| September, 1953 | 239,988 | 216,469 | 23,519 |
| October, 1953 | 187,533 | 169,155 | 18,378 |
| November, 1953 | 267,046 | 240,876 | 26,170 |
| December, 1953 | 198,826 | 179,341 | 19,485 |
| Total Monthly Inventory | 3,810,963 | 3,437,489 | 373,474 |
| Average Monthly Inventory Value | 317,580 | 286,457 | 31,123 |

[fol. 24] 7. The dollar value of the inventory carried in The Rollman and Sons Co. warehouse in Cincinnati consisted entirely of group 1 type merchandise, as follows:

County: Hamilton

Taxing District: Cincinnati

| | | Group 1 |
|--------------------------------|---------------|---------------|
| January, 1954 | \$ 275,830. | 275,830 |
| February, 1953 | 283,380 | 283,380 |
| March, 1953 | 283,390 | 283,390 |
| April, 1953 | 263,898 | 263,898 |
| May, 1953 | 236,180 | 236,180 |
| June, 1953 | 186,090 | 186,090 |
| July, 1953 | 254,580 | 254,580 |
| August, 1953 | 297,130 | 297,130 |
| September, 1953 | 326,630 | 326,630 |
| October, 1953 | 333,410 | 333,410 |
| November, 1953 | 314,900 | 314,900 |
| December, 1953 | 265,950 | 265,950 |
| Total Monthly Inventory | 3,321,368 | 3,321,368 |

| | | |
|------------------------------------|---------|---------|
| Average Monthly Inventory Value | 276,780 | 276,780 |
|------------------------------------|---------|---------|

Note: Items representing group 2 were warehoused within the retail store.

8. The dollar value of the inventory carried in The Sterling Lindner Davis Company warehouse in Cleveland was divided into two major groups, as follows:

County: Cuyahoga

Taxing District: Cleveland

| | | Group 1 | Group 2 |
|--|---------------|---------------|-------------|
| January, 1954 | \$ 320,668 | 286,228 | 34,440 |
| February, 1953 | 364,299 | 325,173 | 39,126 |
| March, 1953 | 397,766 | 355,046 | 42,720 |
| April, 1953 | 397,590 | 354,889 | 42,701 |
| May, 1953 | 411,818 | 367,589 | 44,229 |
| [fol. 24a] | | | |
| June, 1953 | 393,720 | 351,434 | 42,286 |
| July, 1953 | 381,860 | 340,848 | 41,012 |
| August, 1953 | 351,424 | 313,681 | 37,743 |
| September, 1953 | 355,689 | 317,488 | 38,201 |
| October, 1953 | 430,625 | 384,376 | 46,249 |
| November, 1953 | 419,682 | 374,608 | 45,074 |
| December, 1953 | 356,778 | 318,460 | 38,318 |
| Total Monthly Inventory | 4,581,919 | 4,089,820 | 492,099 |
| Average Monthly Inventory Value | 381,826 | 340,818 | 41,008 |

9. The dollar value of the inventory carried in the Morehouse-Fashion Co. warehouse in Columbus was divided into two major groups, as follows:

County: Franklin

Taxing District: Columbus

| | | Group 1 | Group 2 |
|----------------|------------|---------|---------|
| January, 1954 | \$ 150,453 | 127,885 | 22,568 |
| February, 1953 | 170,263 | 144,724 | 25,539 |
| March, 1953 | 168,855 | 143,527 | 25,328 |
| April, 1953 | 185,847 | 148,678 | 37,169 |
| May, 1953 | 187,934 | 150,347 | 37,586 |
| June, 1953 | 168,370 | 134,696 | 33,674 |
| July, 1953 | 171,660 | 145,911 | 25,749 |
| August, 1953 | 179,229 | 152,345 | 26,884 |

| | | Group 1 | Group 2 |
|--|---------------|---------------|-------------|
| September, 1953 | 187,929 | 159,740 | 28,189 |
| October, 1953 | 203,896 | 163,117 | 40,779 |
| November, 1953 | 189,647 | 113,788 | 75,859 |
| December, 1953 | 159,065 | 103,386 | 55,679 |
| Total Monthly Inventory | 2,123,148 | 1,688,144 | 435,004 |
| Average Monthly Inventory Value | 176,929 | 140,679 | 36,250 |

[fol. 25] 10. Group 1 in the A. Polksky, Rollman, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Infants furniture, kitchen furniture, bulk housewares (such as unpainted furniture, step ladders, etc.), stoves, refrigerators, sinks, cabinets, dishwashers, washing machines and dryers, mattresses, television, radios, record players, floor coverings (such as linoleum, carpets and rugs), pre-packaged sets of dinnerware, bulk toys, such as bicycles, gym sets, etc.; living room furniture, dining and bedroom furniture and miscellaneous casual furniture.

The items covered by Group 1 are those which normally would be sold to customers in the retail store from floor samples maintained therein and with respect to which sales deliveries were normally made to the customer from warehouse stocks.

11. Group 2 in the A. Polksky, Sterling Lindner Davis, and Morehouse-Fashion warehouses was composed of the following items:

Luggage, sporting goods (such as golf equipment, fishing equipment, etc.), pillows and blankets, miscellaneous wrought iron novelties such as are normally sold in the stationery department of a department store; paints, some miscellaneous sizes of small rugs, sanitary goods, toilet paper and soaps and venetian blinds.

The items covered by Group 2 are those which normally would be sold to customers in the retail store and delivered

to the customer from stocks of merchandise maintained in the retail store and transferred from the warehouse to the retail store for that purpose.

12. All the items of merchandise stored in the several warehouses of appellant were finished products in condition for sale to the ultimate consumer. The items stored, being held (a) for ultimate distribution to the retail department stores of appellant (Group 2), or (b) ultimate delivery to customers as the result of sales made to customers at the retail stores of appellant (Group 1). No sales were made to customers directly from warehouse stocks of merchandise. None of the items stored in the said warehouses were manufactured by appellant, but all were purchased from suppliers located both within and without Ohio.

13. The foregoing constitutes all of the facts to be offered by either of the parties hereto in these proceedings.

C. William O'Neill, Attorney General, State of Ohio,
Larry H. Snyder, Assistant Attorney General,
State of Ohio, Attorneys for the Tax Commissioner, State of Ohio.

Carlton S. Dargusch, Sr., Attorney for Allied Stores of Ohio, Inc.

CLERK'S NOTE:

For exhibits to stipulation see end of record.

BEFORE THE BOARD OF TAX APPEALS OF OHIO

OPINION AND ORDER—August 18, 1955

This appeal is from a final order of the Tax Commissioner made on March 2, 1955. In and by this order, issued upon an application for review and redetermination, the commissioner made an increased personal property tax assessment against the taxpayer for the year 1954.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice

of appeal, the record of a hearing had before this board on June 1, 1955, a stipulation of facts, certain exhibits and briefs of counsel.

[fol. 26] Appellant's counsel, in the course of his opening statement, succinctly states the taxpayer's complaint, and the question that is now before this board. He says:

"In the notice of appeal we raise two questions, one of which we do not desire to present, as we wish to present but a single question to the Board in the Allied Stores case. The matter upon which we will go forward is that which involves the taxability of the storage merchandise held by taxpayer, a domestic corporation, in storage warehouses for storage only within the meaning of the statute.

"It is our contention that the statutes of Ohio which purport to levy a tax on the storage inventory of this taxpayer discriminates against it and deny taxpayer the equal protection of the laws under both the state and Federal constitutions in that property of the same kind when held by a non resident is excepted from taxation under the so-called Goodrich case. (Goodrich Company v. Peck, 161 O. S. 202).

"We have raised a question also, as I indicated, of the value of furniture and fixtures which is a question of fact which we do not intend to go forward with, and we will present only the legal question that is involved in the storage merchandise.

"I think there are two problems there. One, whether the merchandise in question is held in the storage warehouse for storage only within the meaning of the statute; and, secondly, whether the statutes which purport to levy a tax on that property are unconstitutional in that they deny taxpayer the equal protection of the laws."

[fol. 26a] It, therefore, appears that appellant abandons all other complaints, save the two questions noted.

The only real point of difference between the present case and that of the Goodrich case, supra, lies in that appellant is a domestic, or an Ohio corporation, engaged exclu-

sively in merchandising, while The Goodrich Company is a nonresident manufacturing corporation. After again re-examining the decisions of the court in General Cigar Co., Inc., v. Peck, 159 O. S., 152, and Goodrich Co. v. Peck, supra, the Board of Tax Appeals is of the opinion that appellant's first problem must be answered in the affirmative.

Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 (General Code Section 5325-1), matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made, which is hereby accordingly done.

[fol. 31]

IN THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO

OPINION

(Supreme Court Case No. 34926).

"Judgment affirmed. The property, under the agreed facts, was 'kept on hand—as merchandise' and 'held as means—for carrying on the business' of the appellant and was thus 'used in business' in the State of Ohio (Sec. 5701.08 R. C.) and consequently came within the purview of Section 5709.01 R. C. and was taxable as 'personal property located and used in business in that state.' The positive statement in Section 5701.08 R. C. that 'products belonging to a non-resident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the legislature to declare. See City of Xenia v. Schmidt, 101 O. S. 437; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364. Goodrich Co. v. Peck, 161 O. S. 202, in effect so holds. We decide, therefore, that the decision of the Board of Tax Appeals was neither unreasonable nor unlawful. Exceptions. Order see journal."

[fol. 32]

IN THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO

JOURNAL ENTRY OF JUDGMENT—Filed May 21, 1956

(Supreme Court Case No. 34926)

This cause came on to be heard on the appeal of the appellant under the provisions of Section 5717.04, Revised Code, from the decision of the Board of Tax Appeals entered August 18, 1955, and the same was submitted to the court upon the certified transcript of the record of the proceedings before the board, and the briefs and arguments of counsel, and the court upon consideration thereof finds that the decision of the Board of Tax Appeals is reasonable and lawful and that said decision should be affirmed.

It is therefore ordered, adjudged and decreed that said decision of the Board of Tax Appeals be and the same hereby is affirmed. It is further ordered that the costs of this appeal be taxed against the appellant.

To all of which appellant excepts.

[fol. 37]

IN THE SUPREME COURT OF OHIO

Case No. 34926

ALLIED STORES OF OHIO, INC., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner, Appellee.

OPINION—January 30, 1957

Statutory Construction—Limiting Language Repugnant to Constitution—Court Cannot Cure Invalidity by Striking Such Language, When—Taxation—Discrimination—Property “Used in Business” Limited—Merchandise of Non-resident Held for Storage, Excepted.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

Decided January 30, 1957.

Appeal From the Court of Appeals for Cuyahoga County.

Allied Store (sic) of Ohio, Inc., herein referred to as the taxpayer, is an Ohio corporation. In an appeal to the Board of Tax Appeals from a final order of the Tax Commissioner, the taxpayer contended that the Tax Commissioner had [fol. 38] erroneously assessed for taxation for the year 1954 certain "merchandise * * * held in a storage warehouse for storage only" within the meaning of those words as used in Section 5701.08, Revised Code, in effect prior to September 30, 1955, and that the statutes of Ohio were unconstitutional to the extent that they purported to levy a tax on such property not "belonging to a nonresident of" Ohio, in that they denied a resident such as the taxpayer the protection of the laws equal to that enjoyed by a nonresident. See *Little v. Smith, Atty. Genl.*, 124 Kan., 237, 257 P., 959, 57 A. L. R., 100; *Colgate v. Harvey*, 297 U. S., 404.

Section 5709.01, Revised Code, reads so far as pertinent:

" * * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof."

Section 5701.08, Revised Code, prior to September 30, 1955, read so far as pertinent:

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when acquired or held as means or instruments for carrying on the business * * * or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is (are) not used in

business in this state if held in a storage warehouse for storage only."

In its final entry, the Board of Tax Appeals stated in part:

"The only real point of difference between the present [fol. 39] case and that of the *Goodrich case* * * * (161 Ohio St., 202, 118 N. E. (2d), 525) lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while the Goodrich company is a nonresident manufacturing corporation. * * *

"Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 * * *, matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made * * *."

In affirming the decision of the Board of Tax Appeals, the Court of Appeals stated in part:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the Legislature to declare. See *City of Xenia v. Schmidt*, 101 Ohio St., 437 (130 N. E., 24); *Travelers' Ins. Co. v. Connecticut*, 185 U. S., 364. *Goodrich Co. v. Peck*, 161 Ohio St., 202 (118 N. E. (2d), 525), in effect so holds."

The cause is now before this court on appeal from the judgment of the Court of Appeals as a case involving a debatable constitutional question and pursuant to allowance of a motion to certify the record.

[fol. 40] OPINION: Taft, J.

Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it

necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," was void and should be stricken. That being so, it is apparent that any of taxpayer's "merchandise *** held in a storage warehouse for storage only" would be taxable because described by the preceding words remaining in the statute and reading, "stored *** as *** merchandise."

Of course, if only that portion of the proviso, after the semicolon in subdivision (A) of Section 5701.08, which read, "belonging to a nonresident of this state," is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would prevent taxation of the taxpayer's "merchandise *** held in a storage warehouse for storage only." However, the question remains as to the power of this court to effect that result by striking only that portion of the proviso. In other words, if we assume that the taxpayer's contention that the discrimination between nonresidents and residents contemplated by the words of the proviso would deny a resident the equal protection of the laws and must be eliminated, has this court the power to eliminate that discrimination by striking only that portion of the proviso reading, "belonging to a nonresident of this state"? If it does not have that power, the whole proviso must be stricken in order to eliminate that discrimination and then the taxpayer would obviously have nothing upon which to base its claim for the relief which it seeks.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

In the opinion by Welch, J., in *State, ex rel., McNeal v. Dombaugh, Clerk*, 20 Ohio St., 167, 174, it is said:

"It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction, it is to be regarded as part of the act. The *meaning* of the Legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law."

In *State, ex rel. Wilmot, v. Buckley*, 60 Ohio St., 273, 296, 54 N. E., 272, it is said in the opinion by Burket, J.:

[fol. 42] " * * * the court has no lawmaking power, and cannot extend a statute over territory from which it is excluded by the General Assembly. A court can hold a whole act unconstitutional because it is not broad enough * * * ; but it cannot extend an act which is too narrow, so as to take in territory which was left out by the General Assembly."

In 11 American Jurisprudence, 855, Section 161, it is said:

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

See also *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, 46 L. Ed., 679, 22 S. Ct., 431; *State, ex rel., Wilson, Solr., v. Lewis, Aud.*, 74 Ohio St., 403, 78 N. E., 523; *State, ex rel., Squire, Supt. of Banks, v. City of Cleveland*, 150 Ohio St., 303, 336, 82 N. E. (2d), 709; *State, ex rel., English v. Industrial Commission*, 160 Ohio St., 215, 217 *et seq.*, 115 N. E. (2d), 395; but see *State, ex rel., v. Baker*, 55 Ohio St., 1, 44 N. E., 516.

In the instant case, we do not have a legislative situation where the proviso was merely enacted as a part of a statute [fol. 43] defining the objects to be subject to taxation. In such an instance, striking the words "belonging to a non-

resident of this state" would merely prevent the tax from being extended as far as the General Assembly intended. By doing that, this court would not be extending the operation of the statute so as to cover subjects or objects that the General Assembly did not intend to cover.

However, in the instant case, these taxing statutes, as originally enacted in 1931 (114 Ohio Laws, 714), did not contain the proviso which the taxpayer must necessarily rely upon for any relief *after* it has had this court remove from it the portion which it contends was invalid. The proviso was added by an amendment to the statute in 1933 (145 Ohio Laws, 548). See annotation, 66 A. L. R., 1483. Cf. *Frost v. Corporation Commission of Oklahoma*, 278 U. S., 515, 525, 73 L. Ed., 483, 49 S. Ct., 235; *Reitz v. Mealey, Commr.*, 314 U. S., 33, 38, 39, 86 L. Ed., 21, 62 S. Ct., 24; 11 American Jurisprudence, 841, 856, 857, Sections 154, 161. Prior to that amendment, the General Assembly had expressed an intention to tax any property "when stored or kept on hand as * * * merchandise." The amendment dealt with a withdrawal of some of that property from such taxation. The General Assembly provided only for withdrawal of "merchandise or agricultural products belonging to a nonresident." It did not provide for anything with respect to such merchandise or agricultural products belonging to a resident. If this court merely strikes the words "belonging to a nonresident of this state," the effect of that would be to provide for such a withdrawal of "merchandise or [fol. 44] agricultural products" belonging to a resident; and it would thereby be substantially *extending* the operation of the legislative enactment beyond the scope contemplated by the legislative language. As the taxpayer recognizes in its reply brief, its contention is that "the *failure* of the Legislature to *extend* the exception to residents is" what was unconstitutional. By merely striking the words "belonging to a nonresident of this state," this court in effect would be exercising a legislative power which it does not have.

Therefore, if we assume that the proviso was unconstitutional and invalid because it denied to residents a protection of the laws equal to that enjoyed by nonresidents, it would be necessary to strike the whole proviso to elim-

inate that invalidity. If that is done, the taxpayer would not be entitled to any relief. It follows that the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

Stewart, Bell, Matthias and Herbert, J.J., concur.

Weygandt, C.J., and Zimmerman, J., concur in the judgment.

[fol. 45]

IN THE SUPREME COURT OF OHIO

Case No. 34926

APPLICATION FOR REHEARING—Filed February 13, 1957

Appellant, Allied Stores of Ohio, Inc., applicant herein, respectfully requests rehearing of *Allied Stores of Ohio, Inc., v. Bowers*, 166 Ohio St., 116, for the following reasons:

First, the court declined to determine; and as a consequence neither resident corporations nor the commissioner are yet certain, if the rule announced in *General Cigar Co., Inc. v. Peck*, 159 Ohio St., 152, and *B. F. Goodrich Co., v. Peck*, 161 Ohio St., 202, ever applies to storages only of resident corporations.

Second, the decision leaves unanswered one of the principal issues, whether the court will follow *General Cigar Co., Inc., v. Peck*, 159 Ohio St., 152, and *B. F. Goodrich Co., v. Peck*, 161 Ohio St., 202. To settle this question the commissioner or taxpayers will now have to pursue appeal in the cases presently pending before The Board of Tax Appeals involving assessments against storages only of foreign corporations. There must be a final determination of the problem so that taxpayers will not be liable continually to deficiency assessments by the commissioner for past years.

Third, the present decision carries with it the unavoidable implication that, although resident corporations are discriminated against by Section 5701.08, Revised Code, [fol. 46] such discrimination must stand because the court

is powerless to remove the classifying feature of the exception, even though removal would admittedly eliminate the discrimination. We cite in particular the language appearing on page 118, of *Allied Stores of Ohio, Inc., v. Bowers*, 166 Ohio St., 116:

"Of course, if only that portion of the proviso after the semicolon in subdivision (A) of Section 5701.08, which read, 'belonging to a nonresident of this state,' is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would prevent taxation of the taxpayer's 'merchandise *** held in a storage warehouse for storage only.'"

Fourth, the decision of the court assumes that if it should act to correct the discrimination, it would be required to remove the entire exception. The authorities noted in the decision would prohibit extension of the tax by removal of the entire exception as much as they would prohibit removal of specific language within the exception. Before the exception could be taken from the statute by judicial construction, it would first have to be shown that the legislature would acquiesce in the resultant extension of the tax to all storages; that it would not, is proved by the fact that the statute, after the most recent amendment, still does not tax all storages. More importantly, though, removal of the exception was not an issue. Applicant could have had no standing to seek the overthrow of the rights of foreign corporations under the exception, and the commissioner, who is charged with administering the statute as written could have had no standing to challenge the legislature in granting the exception. The single question before the court was whether, in light of the exception given to foreign [fol. 47] corporations, residents should be accorded equal treatment by being relieved of the tax imposed upon them.

Fifth, the Supreme Court always has jurisdiction to consider the whole statute and to declare that insofar as it imposed a tax discriminatorily it was, *pro tanto*, unconstitutional. The court's understanding that it must accept the exception as enacted was not proper cause for failure.

to examine the entire section and to declare it discriminatory to the extent it imposed the tax on residents while at the same time excepting nonresidents from taxation.

Sixth, applicant concludes that if the exception for storages only of non-residents cannot be disturbed, since that would result in levying a tax on persons and property which the legislature has declared shall not be taxed, and if the limitation within the exception may not be removed, since that would result in amending the exception, then the court must decide whether the positive provisions of Section 5701.08, Revised Code, imposing the tax on all storages of residents, including storages only, creates an unconstitutional classification within the section read as a whole. The decision of the court comes to the point where it should take (sic) resolve the problem of discrimination and instead it stops. The matter therefore stands at a stalemate with applicant being discriminated against, or at least not knowing whether it is being discriminated against as a matter of law, but nevertheless forced to pay the tax.

[fol. 48] For the enumerated reasons above stated, applicant respectfully requests rehearing in this case.

/s/ Carlton S. Dargusch, Sr., /s/ Jack H. Bertsch.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50]

IN THE SUPREME COURT OF THE STATE OF OHIO

JOURNAL ENTRIES

Tuesday, June 25, 1957.

Journal No. 42, p. 353.

The appellant, Allied Stores of Ohio, Inc., is herewith for good cause shown, granted an extension of time until August 3 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Monday, July 29, 1957.

Journal No. 42, p. 369.

The appellant, Allied Stores of Ohio, Inc., is herewith for good cause shown, granted an extension of time until September 30 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Tuesday, October 1, 1957.

Journal No. 42, p. 393.

The appellant, Allied Stores of Ohio, Inc., is herewith for good cause shown, granted an extension of time until October 31 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 54]

EXHIBIT C

Premier Map of City of Cincinnati, Ohio

(See Opposite) ~~Exhibit~~

Note

Only the pertinent
portion of map Exhibit
is being included here.

THE PREMIER STREET MAP

of

CINCINNATI

ALEXANDER GROSSE, TRGS.

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POSTAL ZONES
STREET INDEX
ONE-WAY STREETS
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[fol. 51]

SUPREME COURT OF THE UNITED STATES

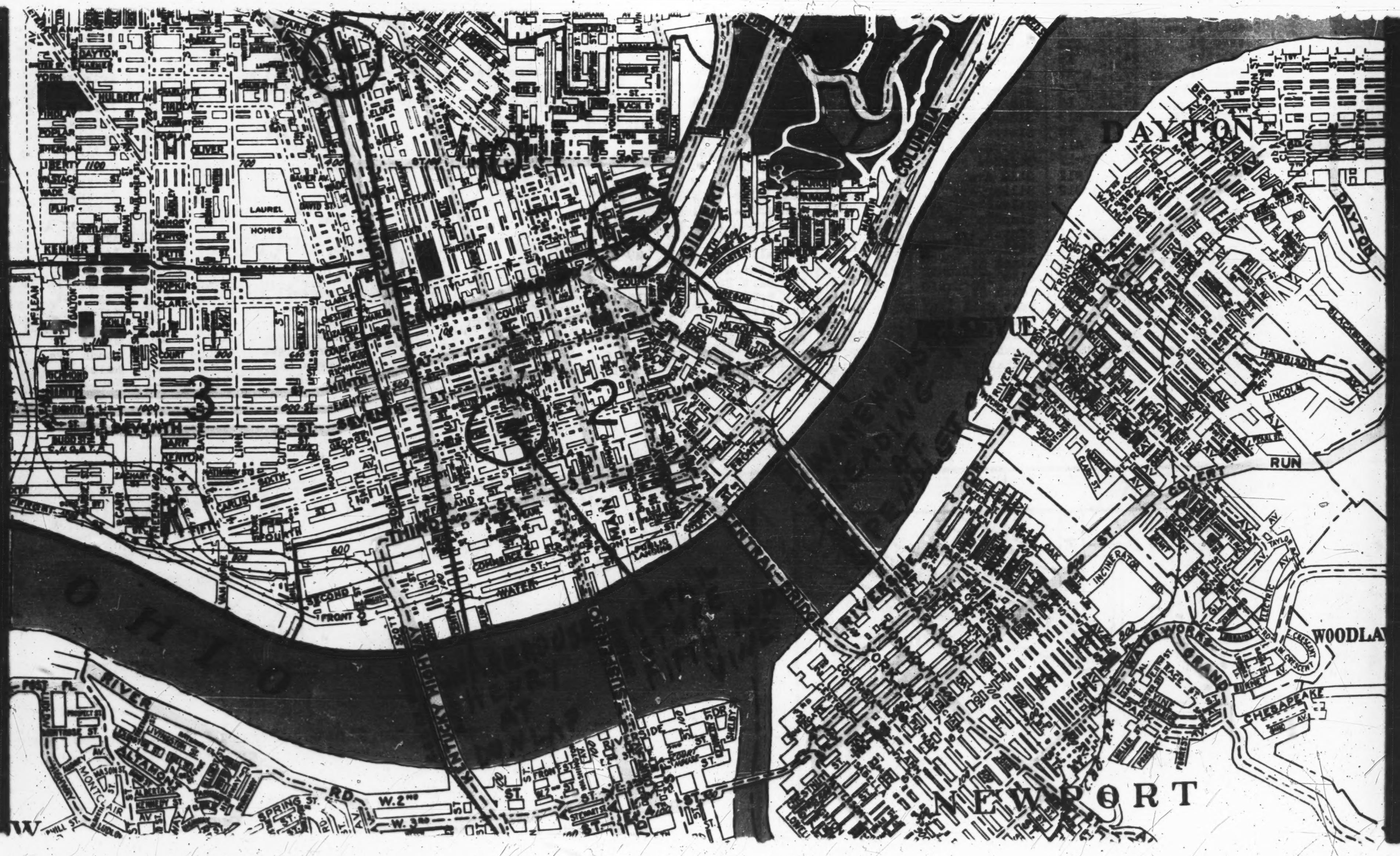
Nos. 588 and 589, October Term, 1957

[Title omitted]

Appeals from the Supreme Court of the State of Ohio.

ORDER NOTING PROBABLE JURISDICTION—January 6, 1958

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.



[fol. 52]

EXHIBIT A

Premier Map of City of Akron, Ohio

(See Opposite) ~~Exhibit A~~

Note

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portion of map Exhibit
is being included here.

THE PREMIER STREET MAP

of

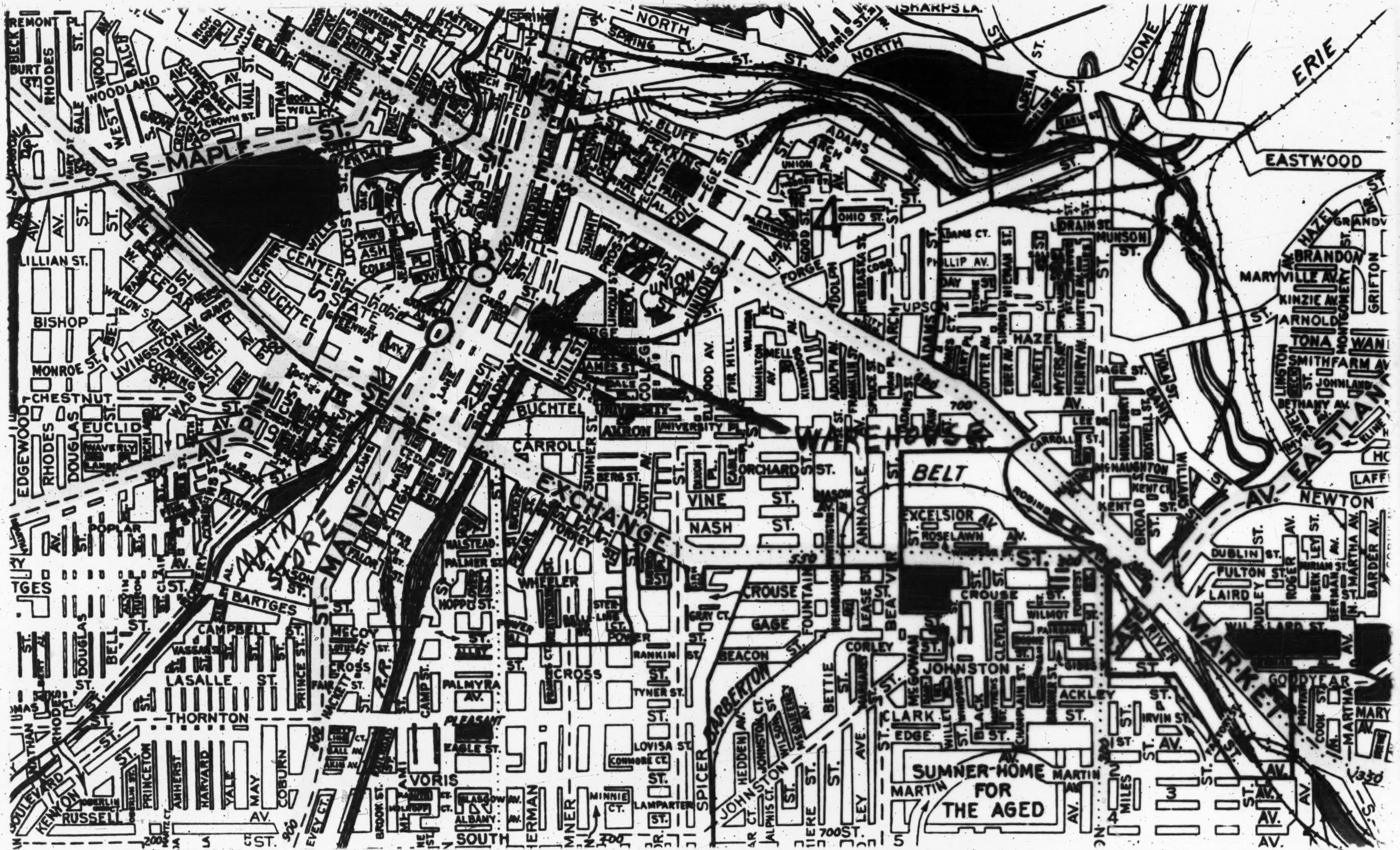
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[fol. 53]

EXHIBIT B

Premier Map of City of Cleveland, Ohio

(See Opposite) ~~Exhibit B~~

Note

Only the pertinent
portion of map Exhibit
is being included here.

[fol. 55]

EXHIBIT D

Premier Map of City of Columbus, Ohio

(See Opposite) ~~Exhibit D~~Note

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646

THE PREMIER STREET MAP

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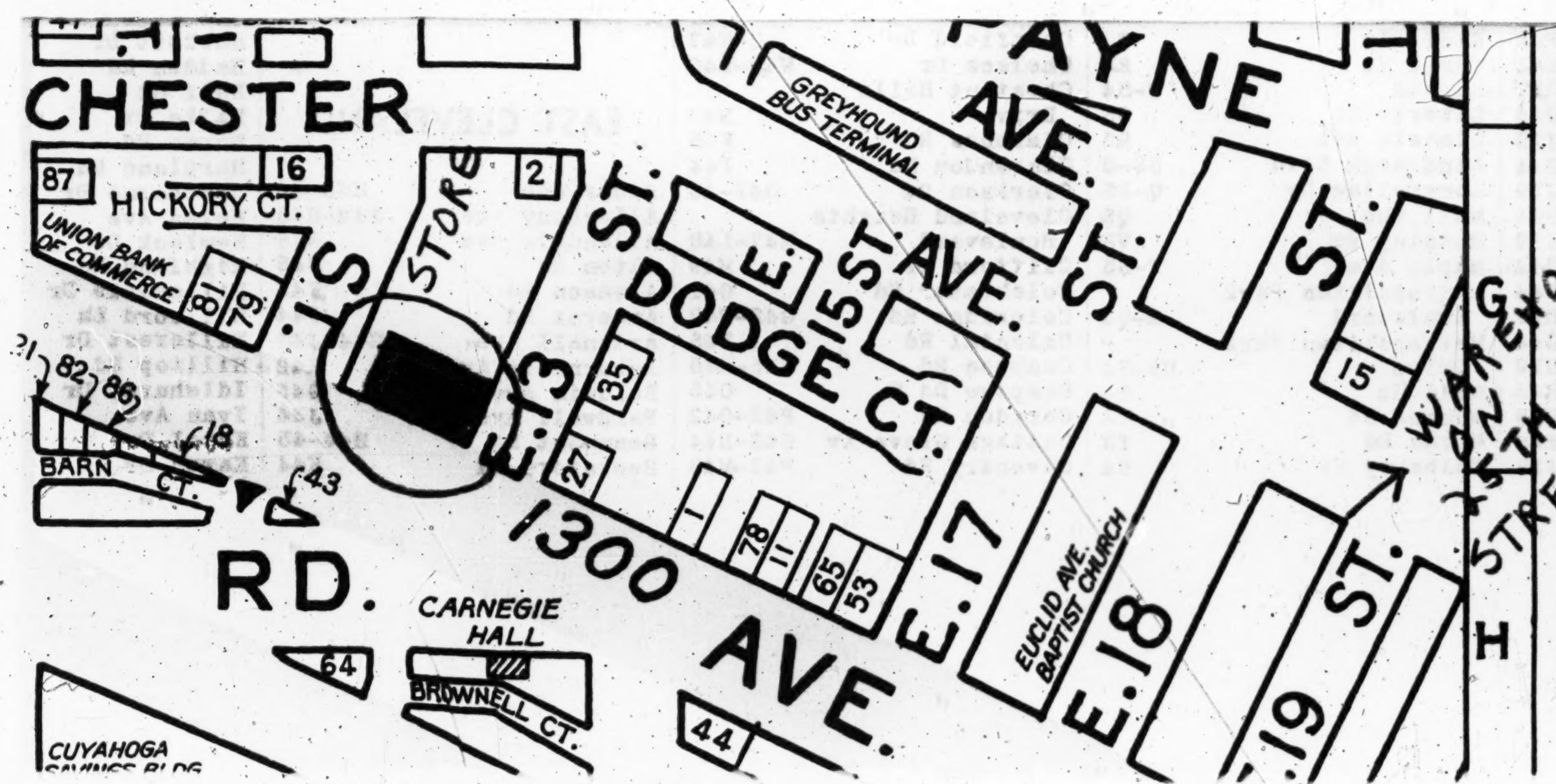
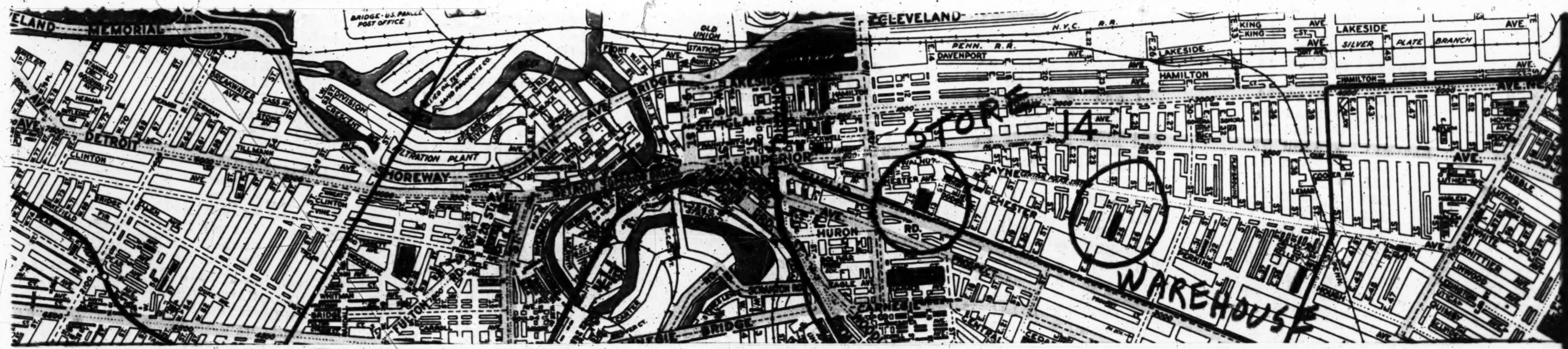
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66. Park Building
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Post Office
Public Auditorium
Public Library
Public Square. E
72. Rockefeller Building
73. Rose Building
St. Johns Cathedral
74. Schofield Building
76. Society for Savings
Building
Stadium
77. Standard Building
78. State Theatre
79. Statler Hotel
80. Sterling Lindner Davis
81. Stillman Theatre
84. Taylor Sons & Company
85. Terminal Tower Building
86. Truman Building
Union Bank of Commerce
Union Station

